Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

GLENDALE UNION HIGH SCHOOL DISTRICT,

Petitioner,

v.

CLAUDETTE LUTZ,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a determination that an individual is substantially limited in a major life activity may be based solely on evidence of the degree of the impairment following the individual's termination from employment that was not available to the employer at the time the adverse employment action was taken.

Whether an individual attempting to establish that she was substantially limited in a major life activity must offer evidence that she was significantly restricted in the activity as compared to an average person in the general population.

PARTIES TO THE PROCEEDINGS BELOW

Claudette Lutz, Respondent herein, filed the underlying civil actions in this matter.

Petitioner is not a publicly held company. Petitioner does not have a parent corporation.

Petitioner Glendale Union High School District No. 205 (hereinafter referred to as "Petitioner" or "Glendale") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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CITATION OF THE UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

Neither the judgment of the Ninth Circuit Court of Appeals nor the ruling by the limited States District Court for the District of Arizona are officially cited or published. Their citations are:

Court of Appeals No. 99-17410
District Court No. CV-98-01076-EHC

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as Claudette Lutz v. Glendale Union High School District No. 205, et al., No. 99-17410 and is set forth in Appendix A.

The opinion of the United States District Court for the District of Arizona in Claudette Lutz v. Glendale Union High School District No. 205, et al., D.C. No. CV-98-01076, which was reviewed by the Court of Appeal is unpublished and set forth in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 20, 2001.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, section 1254(1), and Rule 13 of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Americans With Disabilities Act [42 U.S.C. § 12101 *et seq.*] (hereinafter "ADA") are set forth in Appendix C.

The relevant provisions of the Equal Employment Opportunity Commission (hereinafter "EEOC") interpretive guidelines for the ADA [29 C.F.R. pt. 1630 app., § 1630.2(j)] are set forth in Appendix C.

STATEMENT OF THE CASE
STATEMENT OF FACTS

Respondent Claudette Lutz (hereinafter "Respondent") is a former employee of Glendale, a public school system with nine high schools in the cities of Glendale and Phoenix, Arizona. Respondent was one of the assistant principals at Thunderbird High School (hereinafter "Thunderbird"). Respondent alleges that Glendale violated the Americans With Disabilities Act ("ADA") by terminating her employment.

Glendale had employed Respondent since 1972 and since 1983 she had been an Assistant Principal at different high schools. Her most recent assignment was the Assistant Principal of Student Services at Thunderbird. Her immediate supervisor was the school's Principal, Jennifer Johnson (hereinafter "Johnson"). Respondent disliked and did not get along with Johnson. She also did not get along with various counselors and administrators. There was rancor between Respondent and Johnson and had been for the last couple of years Respondent worked at Thunderbird. Because of her strained relationships with Johnson and other personnel, Respondent began to feel work-related stress.

The Superintendent, James Kieffer (hereinafter "Kieffer") and the Assistant Superintendents were aware of the rancor and rifts between Respondent and Johnson and between Respondent and certain personnel, which were negatively affecting her effectiveness. Respondent's problems with Johnson caused Kieffer to meet with Respondent in early May 1997. Prior thereto, in April 1997, Respondent submitted a written request to Superintendent Kieffer for a promotion to a principalship. Because of the situation at Thunderbird, and the conclusions that Respondent's relationship with Johnson was irreparable and she was no longer effective, Respondent was scheduled for reassignment. She was scheduled to transfer to Washington High School.

Respondent had been afflicted with diabetes for a number of years. Her diabetic condition was known to Johnson and District administrators. Her diabetic condition had not, however, affected her ability to perform the necessary duties, functions and responsibilities of the job. Respondent had never claimed that the diabetes kept her from doing her job nor asked to be given an accommodation to do her job. To the contrary, Respondent had not missed a day of work in over six months. In addition, Respondent had applied for a promotion to another position in another school, which proved to Kieffer that she was fully able to perform her job and her diabetic condition would not have any application.

In her June 4, 1997 meeting with Kieffer regarding her transfer, Respondent became angry and proceeded to argue with him. She stated that the reassignment could cause a worsening of her diabetes and asked that the reassignment be rescinded. After arguing and asking to stay at Thunderbird, she said she had only one year left before she was eligible for retirement. In response, Kieffer offered her

a teaching position for the time until her retirement, which she rejected. With regard to accommodation, it was pointed out that due to her dislike of and problems with her principal and other Thunderbird personnel, the transfer to Washington was for her betterment.

After accepting the fact that the transfer would go forward, Respondent was given a set of directives to follow. Respondent violated these instructions and directives. Shortly thereafter, at a meeting of all the faculty and administrators for Thunderbird, Respondent spoke before the assemblage and said, among other things, that the transfer to Washington was one of the worst things that had ever happened to her. She said:

> I had a friend who was killed in Vietnam; I was diagnosed with spina bifida so I could not have children; I saw my father in a body bag; and now this transfer to Washington. I wish instead of throwing a football [at the Superintendent], I wish I had thrown a hand grenade.[1]

The audience was shocked by her statement and it immediately received notoriety throughout the District, including Washington High School. Her conduct amounted to gross insubordination.

Kieffer asked Respondent to meet with him and explain her actions. She defended each of her actions (refusal to carry out the directives and the statement to the assemblage) as being reactions to a negative employment

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[1] The "football" statement was a reference to a "Faculty Farce" that took place in March 1997 in which Respondent, as part of a skit, threw a football at Kieffer who was seated in the audience.

transaction. She made no meaningful attempt to apologize for her actions or conduct. She again requested, however, to have the transfer rescinded until she could stabilize her diabetic condition. Kieffer again offered her the opportunity to teach or to be reassigned as an administrator at the North Annex, a very easy job, at the same salary and until she was eligible for retirement. Respondent rejected these offers. As a result, June 13, 1997 was her last day of work. On August 19-20, 1997, a termination hearing was held pursuant to the termination and hearing procedures set forth in the Arizona statutes, A.R.S. § 15-339, *et seq.* After hearing testimony and evidence, which included Respondent's presentation of testimony, evidence and medical documentation about her diabetic condition, the Glendale Board of Education voted unanimously to terminate her.

PROCEEDINGS BELOW

This case involves an action filed by Respondent, in Superior Court of Maricopa County on May 12, 1998. Glendale removed this action to the United States District Court for the District of Arizona on June 24, 1998, on the basis of federal question jurisdiction pursuant to Title 28, United States Code, section 1331.

On September 23, 1999, the District Court granted Glendale's motion for summary judgment. The District Court dismissed Respondent's state tort and contract claims, § 1983 claim and her ADA claim. With respect to her ADA claim, the District Court found that Respondent had failed to establish that she is a qualified individual with a disability within the meaning of the ADA. *See* Appendix C. Specifically, the District Court concluded that there was no evidence that Respondent had a substantially limiting impairment.

A timely Notice of Appeal from the Judgment of the District Court was filed by Respondent on or about October 22, 1999. However, Respondent did not challenge on appeal the District Court's decision insofar as it dismissed her state tort and contract claims and her § 1983 claim. The only ruling that Respondent appealed was the dismissal of her ADA claim.

On April 20, 2001, the Court of Appeals issued its Memorandum decision reversing the District Court. *See* Appendix A. The Court of Appeals concluded that the District Court erred in finding, as a matter of law, that Respondent is not a qualified individual with a disability within the meaning of the ADA. Specifically, the Court of Appeals found that there is a triable issue of fact as to whether Respondent is substantially limited in the major life activity of walking.

EXISTENCE OF JURISDICTION BELOW

The District Court had jurisdiction over the federal claims alleged by Respondent's Complaint hereinbelow under Title 28, United States Code, sections 1331, 1441(b) and 1446. The Court of Appeals had appellate jurisdiction under Title 28, United States Code, section 1291.

THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

This petition for a writ of certiorari should be granted because the Ninth Circuit Court of Appeals' Opinion conflicts with the decisions of other courts of appeals concerning the proper time frame for measuring whether an individual is substantially limited in a major life activity.

The Eleventh, Seventh, Sixth and Fifth Circuit Courts of Appeals, as well as many district courts, have held that when measuring an impairment to determine whether it is substantially limiting, courts must focus on evidence of the impairment prior to the date on which the employee requested an accommodation. The time-period is restricted so that only evidence that would have been available to the employer at the time it made the adverse employment action is considered. The Ninth Circuit Court of Appeals, on the other hand, based its decision that Respondent has a substantially limiting impairment on evidence regarding the degree to which Respondent was impaired over a year after she had been removed from working. By doing so, the Appellate Court has created a conflict with the Eleventh, Seventh, Sixth and Fifth Circuit Courts of Appeals as to whether such post-termination (or post-adverse action) evidence may serve as the basis for a court's ruling even though the employer itself would not have had the benefit of such evidence.

The following courts have held that in order to prevail on a claim of disability discrimination, a plaintiff must prove that she had a substantially limiting impairment at the time of the discriminatory act. *See Pritchard v. Southern Co. Serv.*, 92 F.3d 1130, 1133 (11th Cir.), *amended on other grounds on reh'g*, 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) (court focused its inquiry on whether there was sufficient evidence that employee had a substantially limiting impairment "at the time of her termination"); *EEOC v. Sears Roebuck & Co.*, 233 F.3d 432, 438, (7th Cir. 2000) (the progression of an impairment following an individual's termination from employment may be viewed as a factor but is not determinative); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 884 (6th Cir. 1996) (in order to recover on an ADA claim, the plaintiff must first establish as part of her *prima*

facie case that she had a disability *"at the time of the discriminatory act."* (emphasis in original)); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 315 (5th Cir. 1997), *cert. denied* 522 U.S. 1084, 118 S.Ct. 871 (1998) (*citing Pritchard,* 92 F.3d at 1133) ("[A]n impairment must be substantially limiting *at the time of the requested accommodation.*") (emphasis in original); *Kalekiristos v. CTS Hotel Management Corp.*, 958 F. Supp. 641 (D.D.C. 1997), *aff'd* 132 F.3d 1481 (D.C. Cir. 1997); *Eber v. Harris County Hosp. Dist.*, 130 F. Supp. 2d 847, 858 (S.D. Tex. 2001); *Fagan v. United Int'l Ins.*, 128 F. Supp. 2d 182 (S.D.N.Y. 2001); *Leicht v. Hawaiian Airlines Inc.*, 77 F. Supp. 2d 1134 (D.C. Hawaii 1999); *Lance v. University of Tennessee*, 60 F. Supp. 2d 773, 776 (E.D. Tenn. 1999); *Meekison v. Voinovich*, 17 F. Supp. 2d 725, 730 (S.D. Ohio 1998*); Adams v. Rochester Gen. Hosp.*, 977 F. Supp. 226, 232 (W.D.N.Y. 1997); *Boren v. Wolverine Tube, Inc.*, 966 F. Supp. 457 (N.D. Miss. 1997); *Dikcis v. Nalco Chem. Co.*, 974 F. Supp. 669, 673-674 (N.D. Ill. 1997); *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321, 1326 (W.D. Tenn. 1995). To determine if there was a substantially limiting impairment at the time of the discriminatory act, courts necessarily focus on evidence submitted regarding the degree of the impairment in the period leading up to the discriminatory act.

In *Kocsis*, after summarizing a Plaintiff's burden to establish that a disability existed as of the date of the adverse employment action, the Sixth Circuit Court of Appeals reversed the district court's decision because it had relied on evidence of the plaintiff's condition following her termination:

> The district court found that [the plaintiff] could satisfy the "disability" requirement for purposes of establishing her *prima facie* case

> because she was "*presently* under a diagnosis of [multiple sclerosis]." That premise is erroneous, however, because [the plaintiff] must establish that her disability existed **at the time of the discriminatory act**.

97 F.3d at 884 n.13 (emphasis in original, citations omitted).

In *Kalekiristos*, (a case affirmed by the Court of Appeals for the District of Columbia) the court held as follows:

> reports about which the defendant had absolutely no knowledge nor access to prior to terminating the plaintiff can not serve as the sole evidentiary basis of establishing an element of a *prima facie* case of disability discrimination. A person alleging a disability protected by the ADA has a burden of establishing with medical evidence the existence of the alleged disability, and presenting documentation during the term of employment, not following termination.

958 F. Supp. at 657.

The district court in *Fagan* found that the plaintiff had "produced no evidence that he had anything more than a temporary ailment *at the time of his employment* and, consequently, had not met his burden of proving that his injury qualified as a disability under the ADA." 128 F. Supp. 2d at 185-186. In reaching its finding, the court

determined that post-termination medical reports "were irrelevant as to the issue of whether plaintiff suffered a disability at the time of his employment." *Id.* at 186 n.2. Likewise, the court determined that evidence of a handicapped parking permit that was issued seven months after plaintiff's termination "cannot serve as the basis of [the plaintiff's] claim to a disability." *Id.*

In the present case, on the other hand, the Ninth Circuit Court of Appeals relied exclusively on evidence of Respondent's impairment after her employment with Petitioner had ended. First, the Appellate Court relied on an affidavit of Respondent that she signed on July 31, 1998, over thirteen months after she was no longer working and almost one year after her termination and in which she testified to her condition on the date of signature. The affidavit states in pertinent part (i.e., the part quoted and relied on by the Ninth Circuit in its Memorandum decision):

> If I work in the yard for any length of time, I will have a low blood sugar reaction and my mother whom I live with has to continually check on me in the yard to make sure that I have not passed out. I do very little work around the house, as vacuuming and mopping of the home and other physical activities causes me to have low blood sugar and therefore I do not do these activities now more than one time every couple of months at most. I am very limited in my ability to do these things.

Based on this written statement, made in the present tense and signed almost a year after Respondent was terminated, the Ninth Circuit Court of Appeals found as follows:

> [Respondent's] own affidavit indicates that even light physical activity, including "walking for any distance [such as to] grocery shopping" and working around the house, such as vacuuming, mopping and yard work, "causes me to have low blood sugar and therefore I do not do these activities more than one time every couple of months at most."

See Appendix A, page 2. Furthermore, based on Respondent's affidavit, the Appellate Court concluded that "[t]he evidence in the record is sufficient to support a finding that [Respondent] cannot walk for even a minimal distance more than one time every couple of months." *See* Appendix A, pages 3-4.[2]

Additionally, the Ninth Circuit stated that the affidavit of Respondent's doctor confirms her reported difficulties with walking. Like Respondent's affidavit, however, her doctor's affidavit was signed nearly ten months after Respondent's termination from employment. Moreover, the affidavit does not even mention the word walking, let alone state that Respondent had difficulties walking during the period of her employment. Likewise, the doctor's letter used at her termination hearing made no mention of any difficulty whatsoever about walking.

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[2] This contradicts the 38 pages of medical evidence submitted by Respondent at her termination hearing. No record expresses her inability to walk; to the contrary, she underwent a 5-minute, 29-second exercise treadmill test without any problem in February 1997.

Nevertheless, based entirely on such after-the-fact evidence, the Ninth Circuit held: "This evidence is sufficient to support a finding that [Respondent] is substantially limited in the major life activity of walking."[3] *See* Appendix A, page 3. This finding is against the overwhelming weight of the evidence in the record for the period of time the Respondent was working.

By basing its decision on evidence of Respondent's condition over a year after she was through working, the Ninth Circuit Court of Appeals effectively rejected the decisions of the Eleventh, Seventh, Sixth and Fifth Circuits that requires a plaintiff to demonstrate the existence of a substantially limiting impairment at the time of his/her employment. If the Ninth Circuit had focused its inquiry to the pre-termination evidence of Respondent's impairment, it undoubtedly would have affirmed the district court's grant of summary judgment because there is no evidence that Respondent had a substantially limiting impairment during the period of her employment.

Now, Respondent calls upon this Court to resolve the question whether post-termination evidence about which an employer did not and could not have had knowledge of prior to terminating the plaintiff can serve as the sole evidentiary basis for establishing an element of a *prima facie* case of disability discrimination. This Court' decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), suggests that it cannot: "Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be

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[3] The Court of Appeals also pointed to the fact that the District Court noted that Respondent's blood sugar levels "affected her . . . walking" and her medical records "confirm her reported difficulties with walking." *See* Appendix A, pages 2-3.

presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability." *Id.* at 482. However, because the Court has not squarely addressed the issue, Respondent respectfully requests that the Court do so now.

THE COURT OF APPEALS' DECISION EFFECTIVELY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER IN CONFLICT WITH SEVERAL CIRCUIT COURTS

In order to be considered a qualified individual with a disability, a plaintiff must establish that she has a physical or mental impairment that substantially limits one or more major life activity. 42 U.S.C. § 12102(2)(A). Although the ADA does not define "substantially limits", the EEOC has issued interpretive guidelines (hereinafter "EEOC regulations") that explains the term. 29 C.F.R. pt. 1630 app., § 1630.2(j). The regulations provide that an individual is substantially limited in a major life activity if she is:

> (i) unable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j).[4]

[4] In addition, the regulations provide that the "nature and severity of the impairment," the "duration or expected duration of the impairment," or

This Court has pointed out that "[n]o agency...has been given authority to issue regulations implementing the general applicable provisions of the ADA." *Sutton*, 527 U.S. at 479. Nevertheless, several United States courts of appeals have sanctioned courts' reliance upon – and in some cases have compelled parties' compliance with – the EEOC regulations. *See, e.g., Gonzales v. National Bd. Of Med. Exam'rs*, 225 F.3d 620 (6th Cir. 2000) (comparing appellant's abilities with abilities of average person in general population); *Doyal v. Oklahoma Heart, Inc.*, 213 F.3d 492, 497 (10th Cir. 2000)("Because [appellant] introduced no evidence suggesting she experienced greater difficulty than anybody else learning the new computer system or any other new material, she has failed to demonstrate that she was significantly restricted in learning."); and *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997) ("Impairment is to be measured in relation to normalcy, or, in any event, to what the average person does.").

Furthermore, several United States courts of appeals have specifically upheld the requirements set forth in the EEOC regulations where the major life activity at issue is walking.[5] For example, in *Maynard v. Pneumatic Products Corp.*, 233 F.3d 1344 (11th Cir. 2000), the appellant argued that he was substantially limited in the major life activity of walking because his back injury restricted the duration, manner or condition under which he could perform the major life activity. *Id.* at 1347. The Eleventh Circuit Court of

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"the permanent or long term impact, or the expected permanent of long term impact of or resulting from the impairment" are to be considered. 29 C.F.R. § 1630.2(j). This Court has adopted this section of the regulations. *Albertsons, Inc. v. Kirkingburg*, 525 U.S. 555 (1999).

[5] The EEOC regulations include walking as a major life activity. 29 C.F.R. § 1630.2(i).

Appeals rejected the appellant's claim, holding: "[t]o sustain his burden of proof, [appellant] needed to prove that his ability to walk is significantly restricted *as compared to the average person in the general population*. This [appellant] did not do." *Id.* at 1347-1348. (emphasis in original). The appellate court defined the crucial role of the regulations as follows:

> [T]he claimant must present sufficient evidence of the significant restriction before the court may turn the issue over to the trier of fact. This evidence must include information regarding the abilities of the average person in the general population. [Appellant] proffered no evidence on this point, and thus failed to make out a *prima facie* case.

Id. at 1349.

Similarly, the EEOC regulations recently played a pivotal role in a Seventh Circuit decision. *Moore v. J.B. Hunt Transportation, Inc.*, 221 F.3d 944 (7th Cir. 2000). In rejecting the appellant's claim that his rheumatoid arthritis substantially limited his ability to walk because it affected the "rate and pace" of his activities (as opposed to his ability to perform them), Appellant admitted that he could walk distances of less than a mile consistently and could even walk a mile if he paid attention to what he was doing. The Seventh Circuit rejected his claim, holding: "We do not believe that these limitations constitute significant restrictions on [appellant's] ability to walk when compared with the ability of the average person . . . ." *Id.* at 951.

Moreover, in *Kelly v. Drexel University*, 94 F.3d 102, 105 (3rd Cir. 1996), the Third Circuit Court of Appeals quoted the regulations and then held that "the question presented is whether [the plaintiff] adduced sufficient evidence from which a factfinder reasonably could conclude that the nature and severity of his injury significantly restricted his ability to walk as compared with an average person in the general population." *See also Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 186 (3d Cir. 1999) ("there was no testimony that [appellant] stands or walks, during the fifty minutes per hour that he can, with any less ability than the average person.").

Relying on the Third Circuit's decision in *Kelly*, the Sixth Circuit Court of Appeals held that the plaintiff failed to demonstrate that he is disabled within the meaning of the ADA and the regulations. *Penny v. United Parcel Serv.*, 128 F.3d 408, 415 (6th Cir. 1997) (*quoting Kelly*, 94 F.3d at 105). The appellate court found that "[a]lthough the record clearly indicates that [plaintiff] suffers an impairment that affects to some degree his ability to walk, he has not 'adduced sufficient evidence from which a factfinder reasonably could conclude that the nature and severity of his injury significantly restricted his ability to walk as compared with an average person in the general population.'" *Penny*, 128 F.3d at 415.

In *Talk v. Delta Air Lines Inc.*, 165 F.3d 1021, 1025 (5th Cir. 1999), the appellant asserted that she walked with a limp and moved at a significantly lower pace than the average person. Nevertheless, the Fifth Circuit Court of Appeals found that "although [appellant] experiences some impairment to her ability to walk, it does not rise to the level of a substantial impairment as required by the ADA." *Id.*

In *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 644 (2d Cir. 1988), *cert. denied*, 526 U.S. 1018 (1999), the Second Circuit Court of Appeals quoted the regulations and held: "the evidence was insufficient to support the finding that any of the officers' impairments were substantial, particularly when evaluated in light of the first EEOC factor: 'the nature and severity of the impairment' as compared with the average person's ability to perform those activities."

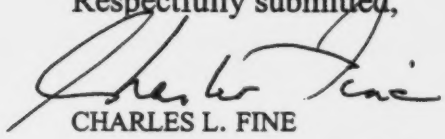
In the present case, on the other hand, Respondent offered no evidence whatsoever of her ability to walk as compared to the ability of an average person in the general population. Respondent's failure to offer such evidence did not present the Ninth Circuit Court of Appeals from overruling the district court's decision and finding in Respondent's favor. Although Petitioner quoted the EEOC regulations, which call for such comparative evidence, in the brief it filed with the Appellate Court, the court did not comment on Respondent's failure to provide any such evidence.

Respondent respectfully requests that the Court settle the question whether courts are bound by the EEOC regulations defining a substantial limitation in rendering decisions in ADA cases. Specifically, Respondent seeks this Court's guidance as to whether a plaintiff attempting to establish that he/she is substantially limited in a major life activity must offer evidence of his/her impairment as compared to an average person in the general population.

CONCLUSION

For the reasons expressed hereinabove, Petitioner Glendale Union High School District respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,



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